IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JAIPUR BENCH

JUDGMENT

Het Ram Vs. State of Rajasthan & Others
(D.B. Habeas Corpus Petition No.821/2007)

D. B. Habeas Corpus Petition under Article 226 of the Constitution of India.

Date of Judgment: February 23, 2007.

PRESENT

HON'BLE MR. JUSTICE SHIV KUMAR SHARMA
HON'BLE MR. JUSTICE R.S.CHAUHAN

Mr. S.R.Bajwa Senior Advocate] for the Petitioner.
Mr. V.P.Bishnoi]

Mr. R.S.Rathore, Addl. Advocate General with
Mr. M.L.Goyal, Addl. Govt. Advocate for the State of Rajasthan.

BY THE COURT: (PER HON'BLE Shiv Kumar Sharma,J.)

In this Habeas Corpus petition the prayer of the petitioner is to declare his detention as illegal and to set him at liberty forthwith.

2. As per the facts stated in the writ petition the petitioner has been taking active interest in politics of State of Rajasthan and he has been prominent labour leader in District Sri Ganganagar. He has also actively associated with the problem of farmers of Sri Ganganagar in particular and whole of Rajasthan in general. He is one of the prominent members of Communist Party of India (Marxists) and has distinction to represent the Assembly seat of Sangaria. He has been in the forefront of numerous agitations launched by his party during the last four decades. It is further pleaded that in the recent past, petitioner took-up cudgels against the State Government in the matter of chaotic water supply to farmers, whose lands

lie under Indira Gandhi Nahar Pariyojna, Phase-I. Many representations were made to the Government to ease water supply situation. Since petitioner had been acting as the Spokesman of the farmers he became an eyesore for the Government of Rajasthan therefore with a calculated design to keep the petitioner away from the peaceful demonstrations made by the farmers, the Government machinery acting with blatant malice, got him arrested under the pretext of apprehending breach of peace. In this context a criminal complaint under section 107/116(3)/ 117 CrPC was stage managed. The same was submitted in the court of Additional District Magistrate Suratgarh (for short `ADM') on October 7, 2006. The learned Magistrate in disregard of mandatory provisions of the law on point issued directions to arrest the petitioner and to produce in court on October 8, 2006. The petitioner was produced on October 8, 2006 and after empty formality of reading over show cause notice was gone into the petitioner was directed to submit interim bonds to maintain peace till proposed enquiry under section 116 CrPC was completed. The petitioner thereafter was locked in jail. Formal orders extending judicial custody remand have been passed on different dates namely October 21, 2006, November 4, 2006, November 18, 2006, December 1, 2006, December 14, 2006, December 28, 2006, January 10, 2007 and January 24, 2007. Significantly on none of these date the petitioner was produced before the ADM. Mandatory requirement of presenting the petitioner in court before extending the remand have continuously flouted. Detention of petitioner is per se illegal and wholly without jurisdiction.

3. The respondents in their return prayed to dismiss the petition. It is pleaded that in the year 2005 also the petitioner was taken in custody

because of disturbing the law and order situation. Then the petitioner filed Habeas Corpus Petition (5309/2005) at Principal Sea of this Court at Jodhpur which came to be dismissed on September 16, 2005 since he was no more in custody. The petitioner involved himself for last two years in the activities which were politically motivated and resulted in disturbance of law and order situation in the area. The petitioner had not only disturbed the law and order situation but had also caused heavy loss to public properties. Consequently a number of FIRs had to be lodged against the petitioner at Police Station Gharsana and Anoopgarh. The petitioner was also involved in FIR No.556/2004 for breaking barricades, throwing stones and causing damages to vehicles etc. Likewise the petitioner on many occasions caused disturbance to law and order situation by holding meetings in the name of Kisan Vyapari Mazdoor Sangharsh Samiti and also by making provocative and instigative speeches.

4. We have pondered over the submissions advanced before us and scanned the material on record as well as the case law placed for our perusal.

5. The right of personal liberty means in substance a person's right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of legal justification. Every imprisonment is prima facie unlawful and it is for a person directing imprisonment to justify his act. The justification is usually that the person is arrested and detained pending trial in court on a charge of crime, or after trial by a court of competent jurisdiction he has been convicted and sentenced to imprisonment or some other kind of detention provided by statute. For wrongful deprivation of liberty the following remedies are available:-

(i) Civil Proceedings for damages in respect of false imprisonment.

(ii) Criminal prosecution for wrongful confinement.

(iii) Application for a writ of Habeas Corpus to obtain release.

6. In origin the writ of Habeas Corpus, found in Edward I's reign, was merely a command by the court to some one to bring before itself person whose presence was necessary to some judicial proceeding. In other words, it was originally intended not to get people out of prison, but to put them in it. Habeas Corpus was a prerogative writ issued by the King against his officers to compel them to exercise their functions properly. In the form of HABEAS CORPUS AD SUBJICIENDUM (the form now commonly used) it came to be available, under certain conditions to private individuals. In the seventeenth century members of the parliamentary opposition imprisoned by Command of the King availed themselves of the writ to seek release. (1627) The Five Knights case, 3 St. Tr.J. Holdsworth, History of English Law Vol. VI PP. 32-37) and it is from this application that originated its constitution importance as the classic British guarantee of personal liberty.

7. There is a difference between Habeas Corpus Ad Subjiciendum and any other Habeas Corpus. The former is a writ of right against which no privilege of person of place can avail. But although a writ of right, it is not a writ of cause, but can only be issued on probable cause. A writ of Habeas Corpus cannot be granted when a person committed to Jail custody by a competent court by an order which prima facie does not appear to be without jurisdiction or wholly illegal (Kanu Sanyal Vs. Distt. Magistrate Darjeeling (AIR 1974 SC 510).

8. It is therefore to be adjudged as to whether the custody of the petitioner is exfacie illegal?

9. Before adverting to the respective submissions we deem it appropriate to consider the provisions contained in Chapter VIII of the Code of Criminal Procedure 1973 in regard to the security for keeping peace. Section 107 provides as under:-

> "107. Security for keeping the peace in other cases.- (1) When an Executive Magistrate receives information that any person is likely to commit a breach of the peace or disturb the public tranquility or to do any wrongful act that may probably occasion a breach of the peace or disturb tranquility and is of opinion that there is sufficient ground for proceeding, he may in the manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond with or without sureties for keeping the peace for such period, not exceeding one year, as the Magistrate thinks fit.
> (2) Proceeding under this section may be taken before any Executive Magistrate when either the place where the breach of the peace or disturbance is apprehended is within his local jurisdiction or there is within such jurisdiction a person who is likely to commit a breach of the peace or disturb the public tranquility or to do any wrongful act as aforesaid beyond such jurisdiction."

10. As per section 111 when a Magistrate acting under section 107 deems it necessary to require any person to show cause, he shall make an order in writing setting forth the substance of information received, the amount of bond to be executed, the term for which it is to be in force, and the number, character and class of sureties (if any) required.

11. Section 116 relates to the inquiry as to the truth of information and it reads as under:-

> "116. Inquiry as to truth of information.- (1) When an order under section 111 has been read or explained under section 112 to a person in Court, or when any person appears or is brought before a Magistrate in compliance with, or in execution of, a summons or warrant, issued under section 113, the Magistrate shall proceed to inquire into the truth of the information upon which action has been taken, and to take such further evidence as may appear necessary.
> (2) Such inquiry shall be made, as nearly as may be practicable, in the manner hereinafter prescribed for conducting trial and recording evidence in summons-cases.
> (3) After the commencement, and before the completion, of the inquiry under sub-section (1), the Magistrate, if he considers that immediate measures are necessary for the prevention of a breach of the peace or disturbance of the public tranquility or the commission of any offence or for the public safety, may, for reasons to be recorded in writing, direct the person in respect of whom the order under section 111 has been made to execute a bond, with or without sureties, for keeping the peace or maintaining good behaviour until the conclusion of the inquiry and may detain him in custody until such bond is executed or, in default of execution, until the inquiry is concluded:
> Provided that-
>
> (a) no person against whom proceeding are not being taken over under section 108, section 109, or section 110 shall be directed to execute a bond for maintaining good behaviour;
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> (b) the conditions of such bond, whether as to the amount thereof or as to the provision of sureties or the number thereof or the pecuniary extent of their liability, shall not be more onerous than those specified in the order under section 111.
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> (4) For the purpose of this section the fact that a person is a habitual offender or is so desperate and dangerous as to render his being at large without security hazardous to the community may be proved by evidence of general repute or otherwise.
> (5) Where two or more persons have been associated together in the matter under inquiry, they may be dealt within the same or separate inquiries as the Magistrate shall think just.

(6) The inquiry under this section shall be completed within a period of six months from the date of its commencement, and if such inquiry is not so completed, the proceedings under this Chapter shall, on the expiry of the said period, stand terminated unless, for special reasons to be recorded in writing, the Magistrate otherwise directs:

Provided that where any person has been kept in detention pending such inquiry, the proceeding against that person, unless terminated earlier, shall stand terminated on the expiry of a period of six months of such detention.

(7) Where any direction is made under sub-section (6) permitting the continuance of proceedings, the Sessions Judge may, on an application made to him by the aggrieved party, vacate such direction if he is satisfied that it was not based on any special reason or was perverse."

12. Section 116(3) is akin to Section 117(3) of the Code of Criminal Procedure 1898. In Section 116(3) of the new code the words of old code "pending the completion of the inquiry under sub section (1)" have been substituted as "After the commencement and before the completion of the inquiry under sub-section (1)". A look at Section 116 demonstrates that the first sub section read with second requires the Magistrate to proceed to inquire into the truth of the information, whereas the third sub-section enables the Magistrate to ask for an interim bond pending completion of inquiry by him. Constitution Bench of Hon'ble Supreme Court in Madhu Limaye Vs. SDM Monghyr (AIR 1971 SC 2486) had occasion to interpret Section 117 of the old Code. It was indicated in para 43 thus:-

"43. In our opinion the words of the section are quite clear. As said by Straight J.in Empress v. Babua, (1883) ILR 6 All 132, the order under S.112 is on hearsay but the inquiry under S.117 is to ascertain the truth of the necessary information. Sub-section (1) contemplates an immediate inquiry into the truth of the information. It is pending the completion of the inquiry that an

interim bond can be asked for if immediate measures are necessary, and in default it is necessary to put the person in custody. Therefore, as the liberty of a person is involved, and that person is being proceeded against on information and suspicion, it is necessary to put a strict construction upon the powers of Magistrate. The facts must be definite character. In Nafar Chandra Pal v. Emperor, 28 Cal WN 23 = (AIR 1924 Cal 114) there was only a petition and a report and these were not found sufficient material. In some of the cases before us no effort was made by the Magistrate to inquire into the truth of the allegation. The Magistrate adjourned the case from day to day and yet asked for an interim bond. This makes the proceedings entirely one sided. It cannot be described as an inquiry within an inquiry as has been said in some cases. Some inquiry has to be made before the bond can be ordered. We therefore, approve of those cases in which it has been laid down that some inquiry should be made before action is taken to ask for an interim bond on placing the person in custody in default. In an old case reported in A.D.Dunne v. Hem Chunder (1869) 12 Suth WR Cr 60 (FB) a Full Bench of the Calcutta High Court went into the matter. The case arose before the present Code of Criminal Procedure and, therefore, there was no provision for an interim bond. But what Sir Barnes Peacock CJ said applies to the changed law also not only with regard to the ultimate order but also to the interim order for a bond. The section even as it is drafted today is hedged in with proper safeguards and it would be moving too far away from the guarantee of freedom, if the view were allowed to prevail that without any inquiry into the truth of the information sufficient to make out a prima facie case a person is to be put in jeopardy of detention. A definite finding is required that immediate steps are necessary. The order must be one which can be made into a final order unless something to the contrary is established. Therefore it is not open to a Magistrate to adjourn the case and in the interval to send a person to jail if he fails to furnish a bond. If this were the law a bond could always be insisted upon before even the inquiry began and that is neither the sense of the law nor the wording or arrangement of the sections already noticed."

(Emphasis supplied)

13. In the case on hand wherein the liberty of petitioner is involved, it is necessary to put a strict construction upon the powers of the ADM. Having scanned the order dated October 8, 2006 of the learned ADM, we notice that after making an order under section 111 the learned ADM, wrote thus:-

> "मै यहां संतुष्ट हूं कि दिनांक 10.10.2006 को तथा इसके घेराव महापडाव व चक्का जाम आदि कार्यो से लोक प्रशान्ति अवश्य ही विशुद्ध होगी। प्रकरण मे बाद पूर्ण अन्वीक्षा ही अन्तिम आदेश पारित किया जायेगा परन्तु लोक प्रशान्ति विशुद्ध होने के निवारण करने के लिए व लोक सुरक्षा के लिए तुरन्त उपाय किया जाना आवश्यक है।अत: गैर सायल को दण्ड प्रकिया संहिता 1973 की धारा 166 (3) के तहत निर्देशित किया जाता है वह जांच समाप्त होने तक परिशान्ति कायम रखने के लिए रूपये 50,000/- राशि का बंधपत्र तस्दीक शुदा प्रतिभूति सहित निष्पादित करे। गैर सायल द्वारा पाबन्द होने तथा जमानत देने से इन्कार किया। अत: गैर सायल को धारा 116 (3) के तहत न्यायिक अभिरक्षा में भेजा जाता है।"

14. Evidently learned ADM did not make any inquiry as provided by sub section (3) of Section 116 into the truth of the information sufficient to make out a prima facie case to put the petitioner in jeopardy of detention. In our considered opinion without commencing the inquiry under sub section (1) of Section 116 learned ADM was not empowered to ask for interim bond. It also appears from the subsequent order sheets that formal orders extending judicial custody remand have been passed on different dates viz. October 21, 2006, November 4, 2006, November 18, 2006, December 1, 2006, December 14, 2006, December 28, 2006, January 10, 2007 and January 24, 2007. On none of these dates the petitioner was produced before the ADM. In yet another decision of Madhu Limaye Vs. Ved Murti (AIR 1971 SC 2481) the Constitution Bench of Supreme Court

propounded that where the case was simply adjourned from time to time and there was no inquiry before remanding the person to custody, his detention was illegal.

15. As a result of the above discussion we hold that the detention of petitioner is illegal and he is entitled to be set at liberty forthwith if not required to be detained in any other case.

16. The writ petition stands allowed as indicated above.

(R.S.Chauhan),J. (Shiv Kumar Sharma)J.

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